STANDARD CHARTERED BANK

v.

YAP SING YOKE & ORS.

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[ORIGINATING MOTION NO. 32-10-87]
12 JANUARY 1989

LAND LAW: *Unregistered charge - Possession of issue document of title - Equitable charge caveatable - Sale of land pursuant to writ of seizure and sale - Equitable charge had priority.*

The plaintiff obtained a charge from the first defendant in respect of a piece of land as security for a loan on 1 April 1985. The land office rejected the charge documents on 23 May 1975 as the official receipt for quit rent were not tendered. The plaintiff had possession of the issue document of title. No further action was taken by the plaintiff's solicitor until it was discovered in February 1986 that their clerk had kept the documents in her drawer. The plaintiff obtained judgment in default against the first defendant on 12 August 1986 for non-payment of the loan. He lodged a private caveat on 4 March 1987.

The second defendant obtained a default judgment against the first defendant for goods sold and delivered. He filed two writs of seizure and sale to enforce the judgment. The land was auctioned to the third and fourth defendants on 6 March 1987 pursuant to the second writ of seizure and sale. He had lodged a private caveat on 11 June 1985.

Held:

[1] The plaintiff's rights prevailed as he had lodged a private caveat to protect his interest before the auction was carried out. An equitable charge was created even though it was not registered. The plaintiff was not negligent as he had possession of the issue document of title.

[2] The second defendant had a personal claim which was enforceable against the first defendant only. He did not have a caveatable interest in the said land. The private caveat which was lodged by him was revoked.

[3] The third and fourth defendants had notice of the plaintiff's interest as he had lodged a private caveat before the auction. O. 47 r. 7(a), Rules of the High Court 1980 was contravened as the auction was carried out less than 14 days after the prohibitory order was filed. The auction was set aside.

[Order accordingly.]

Cases referred to:

Vallipuram Sivaguru v. Palaniappa Chetty, Official Administrator, as Administrator of the Estate of Gan Inn, deceased [1937] MLJ Rep 55
Mercantile Bank Ltd. v. The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196
United Malayan Banking Corporation Berhad v. Goh Tuan Laye & Ors. [1976] 1 MLJ 169
Sockalingam Mudaliar v. Ramasamy Chettair & Anor. [1938] MLJ 227
Karuppiah Chettiar v. Subramaniam [1937] 2 MLJ 116
Zeno Ltd v. Prefabricated Construction Co. (M) Ltd. & Anor. [1967] 2 MLJ 104

Legislation referred to:

National Land Code 1965, s. 323(1)
Rules of the High Court 1980, O. 2 r. 1, O. 47 r. 7(4)

Other sources referred to:
Tenure and Land Dealings in the Malay States by David Wong, pp. 423-425 & 469
National Land Code by Judith Sihombing, p. 601

For the plaintiff - David Wong; M/s. Andrew Wong & Co.
For the first defendant - S. Sivasubramaniam; M/s. Siva Rama & Associates
For the second, third & fourth defendants - Tay Keng Chee; M/s. H.Y. Lee & Hee

JUDGMENT

Lamin Mohd. Yunus J:

The facts of this case are as follows. On or about 1 April 1985 the plaintiff bank accepted a charge over property held under HS(D) 4852 Lot 24401 Mukim Kuala Kuantan from the 1st defendant to secure a housing loan for RM92,000 with interest at the rate of 13% per annum. The said charge was presented for registration to the land office and accepted *vide* presentation number 1170/85. But on 23 May 1985 the charge together with issue document of title were returned to the plaintiff's solicitors as the official receipt for quit rent for the year 1985 was not supplied to the land office. When the documents were returned to the firm of solicitors, they were kept by the clerk of the firm one Miss Catherine Thong who did not bring them to the attention of the solicitors of the said firm. Only in early February 1986, after Miss Thong had left the firm it was discovered that the documents were all the time in her drawer and had not been re-presented. So on 7 February 1986 an attempt was made to once more register the charge. It could not be done as there was already a private caveat *vide* presentation number 567/85 lodged on 11 June 1985 by the 2nd defendant, Yahya Brickworks Sdn. Bhd.

In a separate action *vide* Kuantan High Court Civil Suit No. 180/85, Yahya Brickworks Sdn. Bhd., the 2nd defendant, sued the 1st defendant for goods sold and delivered and obtained judgment in default on 25 June 1985. Pursuant to the said judgment, the 2nd defendant had a writ of seizure and sale issued against the 1st defendant on 7 November 1985. On the same day a prohibitory order was filed and registered on 15 November 1985. On 1 July 1986 the 2nd defendant filed an application for a second prohibitory order and was granted by the Court on 4 September 1986 and issued on 19 September 1986. It was registered with the Pendaftar Hakmilik Negeri, Pahang on 2 October 1986.

The second writ of execution in respect of Kuantan High Court Civil Suit No. 180/85 was filed by the 2nd defendant on 24 February 1987. On the same day, he applied to the Court for a third prohibitory order and issued on 3 March 1987. It was registered with the Pendaftar Hakmilik Negeri, Pahang on 5 March 1987.

On 4 March 1987 the plaintiff lodged a private caveat which was registered *vide* caveat presentation number 114 of 1987, jilid 20, folio 31 and his grounds in support were that the 1st defendant had executed borang 16A (memorandum of charge) in respect of the said land on 1 April 1985 and the said borang 16A was presented for registration on 2 April 1985.

The said property was auctioned off on 6 March 1987 on the order of the abovementioned second writ of execution applied for by the 2nd defendant and purchased by the 3rd and 4th defendants. The full purchase price of RM85,200 was paid by the 3rd and 4th defendants to the Court on 5 June 1987.

The plaintiff in this case comes to this Court to seek the following reliefs as prayed for in encl. 5 namely:

(a) for a declaration that the plaintiff's charge in equity dated 1 April 1985 and the plaintiff's private caveat dated 4 March 1987 have priority of right claim and interest over that of the 2nd defendant's private caveat dated 11 June 1985 and his two prohibitory orders (dated 19 September 1986 and 3 March 1987) and that the plaintiff's said charge be duly registered, and

(b) the writ of seizure and sale issued in respect of the Kuantan High Court Civil Suit No. 180 of 1985 and all proceedings thereunder including the auction sale held on 6 March 1987 be set aside.

With regard to the first prayer I propose to examine the following decided cases as cited and the position of the law and its application.

In the case of *Vallipuram Sivaguru v. V. Palaniappa Chetty, Official Administrator as Administrator of the Estate of Gan Inn, Deceased* [1937] MLJ Rep. 55[1], the facts were that Gan Inn in January 1931 deposited his issue document of title with Palaniappa Chetty the first defendant/respondent as security for a loan and on 17 March 1932 he sold the same land to one Nagappa explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title, Nagappa could not register the transfer and as a result on 21 March 1932 he lodged a caveat against the land.

Gan Inn died on 6 April 1932 i.e., shortly after executing the transfer in favour of Nagappa. On 22 August 1933 Palaniappa Chettiar lodged a caveat which was registered the same day. On 8 December 1933, Nagappa sold and purported to transfer the land to S. Vallipuram the plaintiff.

On 15 June 1934 Nagappa died and no personal representative of his estate was appointed. On 14 August 1934 the land was transmitted to the official administrator as the administrator of the estate of the late Gan Hin.

On 30 December 1935, Palaniappa Chetty commenced his action against the official administrator in his capacity as the administrator of the estate of the late Gan Hin.

On 20 January 1936 Vallipuram lodged a caveat which was registered the same day.

It was held in this case that the first defendant/respondent had acquired by the deposit with him of the issue document of title the right to a lien over the land by registering at any time a caveat under s. 134 of the National Land Code (Cap. 138). It was also held that as between the first defendant/respondent and the plaintiff/appellant the former had the prior equity and that his delay in presenting his caveat for registration was not an omission which operated and enured to forfeit and take away his pre-existing equitable title.

In *Mercantile Bank Ltd. v. The Official Assignee of the property of How Han Teh* [1969] 2 MLJ 196 [2], one How Han Teh deposited documents of title over certain lands with the applicants for the purpose of securing a loan. He failed to repay the loan and judgment was obtained against him. A bankruptcy notice was issued against him but he failed to repay the monies and thus committed an act of bankruptcy. Subsequently the applicant registered caveats against the titles deposited with them as security under s. 330 of the National Land Code. A bankruptcy petition was subsequently filed and receiving and adjudicating orders were made against him. The applicants applied to sell the land by public auction. The application was opposed by the Official Assignee who claimed that the applicants were not the lien holders on the property as at the time of the act of bankruptcy and there was no caveat entered under the National Land Code. The Court held that at the time when the act

of bankruptcy was committed the applicants had an equitable right to a lien. They had a prior interest and were entitled to an order of sale. The Court observed that the applicants had not parted with the document of title and were in their possession all the time and it was open to them to register the caveat at any time.

In the case of *United Malayan Banking Corporation Berhad v. Goh Tuan Laye & Ors.* [1976] 1 MLJ 169, the United Malayan Banking Corporation Berhad (hereafter referred to as the plaintiff/appellant) gave an overdraft to the defendant/respondent, a firm of Syarikat Shin Tong (hereafter referred to as the firm). On 27 April 1968 three partners of the firm deposited with the plaintiff/appellant bank document of title relating to their lands to serve as security for the said overdraft. The plaintiff/ appellant did not caveat the land as they were prohibited from doing so by the Kelantan Land Settlement Ordinance 1955. As the firm did not pay the whole or part of the amount of the overdraft, the plaintiff/appellant, on 13 April 1971, filed a suit against the firm wherein it claimed that the firm was indebted to it but no mention of any lien.

On various dates in 1970, i.e., after the date of the deposit but prior to the date of the prohibitory orders, the owners of the lands executed an agreement of sale agreeing to sell the lands to the respondents. Prior to the date of the prohibitory orders they paid in full the balance of the purchase price. No caveat was entered by them.

On 18 January 1971, the plaintiff/appellant obtained judgment in default of appearance. On 1 January 1972 the plaintiff/appellant obtained a writ of seizure and sale and prohibitory orders relating to those lands. Between 1972 and 1973 the respondents intervened and applied to set aside the prohibitory orders relating to all the fourteen pieces of land. The learned Judge allowed the application and set aside the prohibitory orders. On appeal the Federal Court reversed the decision and found in favour of the plaintiff/appellant.

In this case the plaintiff/appellant only had the document of title deposited with them to secure the overdraft. They have not caveated the land to protect their interest and the Court said that was not their fault because they were prohibited by law i.e., the Kelantan Land Settlement Ordinance 1955 from doing so. The respondents (interveners) on the other hand had bought the lands and paid the full purchase price. They too did not caveat the lands to protect their interest. Also in their case it was not their fault as they were prevented from doing so by the same law. So when the documents of title to the lands were deposited, there were two parties with equitable interest namely the plaintiff/appellant that is the bank and the respondent (interveners) and all those interests were unregistered and unprotected by caveat. The Court decided that all things being equal the Court must protect the interest of those first in time and in this case it was the plaintiff/appellant (bank).

In *Sockalingam Mudaliar v. Ramasamy Chettiar & Anor.* [1938] MLJ 227 the brief facts are as follows. Prior to 22 January 1937 the second defendant executed two charges in favour of the first defendant in respect of three pieces of land belonging to him. At the same time a caveat was also registered at the instance of two women. On that date i.e., 22 January 1937 the second defendant executed another charge over the same three pieces of land, this time in favour of the plaintiff for a consideration of RM3,300. The plaintiff could not get the charge registered because he could not present the issue document of title together with his charge as required by s. 129 of the land code because the issue document of title was in the hands of the first defendant. On 24 February 1937 the plaintiff lodged a caveat on all the lands to protect his interest. On 3 March 1937 the first defendant attached all the three pieces of land under a decree of the Ipoh Magistrate Court in his favour against second defendant for RM359.60 and costs. The attachment was by prohibitory order under the Civil Procedure

Code. It is admitted that the first defendant had notice of the plaintiff's unregistered charge when the attachment was made. At about the same time the two earlier charges of first defendant were discharged. On 23 December 1937 the defendant filed his defence contending that his attachment was a valid legal attachment and that he was entitled to sell all the three pieces of land free from any charge in favour of the plaintiff and to have the proceeds of the sale in priority to any claim by the plaintiff.

The Court decided that the unregistered charge conferred on the plaintiff an equitable interest in the lands and that the lands could only be sold in execution subject to the plaintiff's unregistered charge of 22 January 1937.

The principle in the case of *Sockalingam Mudaliar* was acknowledged by the Federal Court in *Karuppiah Chettiar v. Subramaniam* [1937] 2 MLJ 116 when it said at p. 120:

> The position in this case is some what similar to that in *Sockalingam Mudaliar's* case. In that case an unregistered charge in respect of which caveat had been lodged, and the Court held the equitable interest conferred by the unregistered charge ought to be protected. In the present case the unregistered memorandum of transfer conferred a title in equity on the purchaser for the protection of which he has similarly lodged a caveat. In that case it was held that the land could be sold only subject to the unregistered charge. To say in this case that the land must be sold subject to the unregistered transfer is to say that the land could not be sold because the judgment debtor has divested himself of interest in the land by that transfer so that there is nothing to sell. If the land cannot be sold what is the point in allowing a prohibitory order to stand on the register? I would say therefore that the learned Judge in this case was quite right in following *Sockalingam Mudaliar's* case to set aside the prohibitory order.

The facts of the *Karuppiah Chettiar's* case in so far as they are related for the purposes of the decision as quoted above are briefly as follows. On 8 November 1968 one Mohammad Sharjuddin sold all his interest of an undivided 2/6 share in a certain piece of land to the respondent Subramaniam. Notwithstanding the sale, Sharjuddin remained registered as the proprietor of the said land because he was unable to deliver to the respondent the issue document of title to enable registration of the memorandum of transfer which was duly executed and stamped on the date of the sale. On 13 November 1968 the respondent obtained entry of a private caveat on the register document of title to the land to protect his interest. The appellant was one of the executors of the estate of Suppiah Chettiar, deceased. It appears that Sharjuddin had deposited the issue document of title as security for loans granted to him by the said deceased who apparently had taken no steps to lodge a lien holder's caveat against the land. On 3 March 1969 Sharjuddin executed a second memorandum of transfer in respect of the same land in favour of the executors of the deceased estate. It was on inspection of the register document of title that the executors came to know about the private caveat lodged by the respondent. On 22 April 1969 a prohibitory order was issued against the said interest that the land in execution proceedings at the instance of the appellant who had obtained judgment against Sharjuddin on a claim for recovery of money lent. On 9 May 1969 the respondent intervened by summons-in chambers to have the prohibitory order set aside and succeeded.

In the case of *Zeno Ltd v. Prefabricated Construction Co. (M) Ltd & Anor.* [1967] 2 MLJ 104 the brief facts are as follows. The first defendants took a loan of RM75,000 from the plaintiffs and executed a mortgage and general charge on 16 February 1962 and as security the first defendants deposited with the plaintiff the title deed of a piece of land of which

they were the registered proprietor. The charge was never registered in the land office. The plaintiff lodged a caveat in respect of the said land with the Collector of Land Revenue and duly recorded in the register document of title on 23 April 1962.

On 31 October 1963 the second defendant obtained judgment for RM21,514.87 against the first defendant in a suit. On 14 November 1963 the second defendant obtained a prohibitory order against the said land and presented the same to the collector for registration under the land code. The order provided that it was subject to caveat and prohibitory orders. By an order of Court dated 6 February 1964 in the same suit the second defendant obtained an order for the sale of the said land by public auction.

In April 1969 the plaintiffs commenced these proceedings. The first defendant had not repaid the principal sum of RM75,000. The plaintiffs sought for a judgment in the sum claimed against the first defendant and a declaration that the plaintiff's lien on the land had priority of right claim and interest over that of the second defendant's prohibitory order or order of sale by public auction. Regarding the deposit of the title deed with the plaintiffs the Court held that it was a lien in the nature of an equitable interest and capable of being caveated.

In the present case before me, if I may recall the main facts were that the first defendant obtained a housing loan in the sum of RM92,000 from the plaintiff bank which accepted a charge over a piece of land HS(D) 4852 Lot 24401 Mukim Kuala Kuantan. The charge was presented to the land office for registration. But it was not accepted because the quit rent had not been paid. So the issue document of title together with the charge were returned to the plaintiff's solicitors and thereafter they remained all the time in their possession.

In a separate action the first defendant was sued for goods sold and delivered by the second defendant (Yahya Brickworks Sdn. Bhd.) *vide* Kuantan High Court civil suit no. 180 of 1985 and on 25 June 1985 the second defendant obtained judgment in default (encl. 3, Exhibit SWK9 & 10, see also para. 4 of statement of agreed facts - encl. 23). But before that date (11 June 1985) the second defendant lodged a private caveat over the above mentioned land (see para. 6 of the affidavit of Soo Weng Kee - encl. 3 and affidavit of Yap Yoon Fook.) Subsequent to obtaining judgment in default the second defendant also filed and registered prohibitory orders.

On 12 August 1986 the plaintiff obtained judgment against the first defendant *vide* summons 24-48-86 in the sum of RM97,287.37 for the non-payment of the above-mentioned housing loan granted to the first defendant. On 4 March 1987 the plaintiff lodged a caveat over the said land.

On 6 March 1987 the same land belonging to the first defendant was auctioned off at the instance of the second defendant pursuant to the writ of seizure and sale obtained following the judgment in default in Kuantan High Court Civil Suit 180/85. The third and fourth defendants purchased the land on the land on the same day at the purchase price of RM85,200 and they made the full payment on 25 June 1987.

There is no doubt in my own mind as to the position of the law that by virtue of the unregistered charge dated 1 April 1985 (Exhibit SWK 1 to encl. 3) in favour of the plaintiff, the plaintiff had acquired a title in equity over the said land. As the issue document of title was all the time in the custody of the plaintiff it had acquired a lien in equity over the land: *Vallipuram Sivaguru v. Palaniappa Chetty* and *Mercantile Bank Ltd. v. Official Assignee in the estate of How Han Teh.* The depositee i.e. the plaintiff bank in the present case has the right to lodge a caveat and may do so at any time under the provision of the National Land Code.

Now assuming that the judgment in default in the civil suit 180 of 1985 had been regularly entered in favour of the second defendants, the case for the second defendants appears to be that they had acquired an equitable interest over the land with the lodging of the caveat on 11 June 1985. It was argued against the plaintiff that the plaintiff's charge in equity of 1 April 1985 did not have priority right of claim and interest over that of the second defendant's caveat of 11 June 1985 for the reason that the plaintiff had failed to lodge a caveat to protect his equitable interest. The question here, did the second defendant have an interest in the land in the first instance which could be protected by caveat. When the second defendant lodged the caveat on 11 June 1985, it is quite clear to me that he had no interest whatsoever upon which to base his claim to the land. Of course he had filed a suit against the first defendant for goods sold and delivered but that too had no concern with land and even then there was no judgment as yet at the time of lodging the caveat. In other words he had no caveatable interest on the land (see discussion on 'caveatable' interest under heading "private caveat" in *Tenure and Land Dealings in the Malay States* by David Wong, pp. 423-425 [7]. Section 323 (1)(a) of the National Land Code [8] must pertain to some interest on the land concerned. If I may quote David Wong:

> In a sense the present section enables a return to the principle of the early case in re-registration of a caveat which was based on general purpose of the caveat system and the treatment of rights under a contract of dealing in the Malay States on a similar footing as in other Torrens jurisdiction (at p. 434) and ...at the same time it should be equally clear that however wide a meaning may be put on the words "any right to such title or interest", these words do not confer mere personal rights as may be distinguished from rights relating to land. (p. 435)

Judith Sihombing in her book "*National Land Code*" (at p.601) has also this to say:

> If the claim does not represent a transaction capable of registration then the claim is not caveatable for the caveat procedure "is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument"
>
> ... It is of course axiomatic that a personal claim, (i.e. in general law terms a mere, personal, in *personam* claim) enforceable only against the registered proprietor and not the land, is not able to be caveated. Only claims to interests in land (i.e. in general law terms *in rem* claims) which relate to interests capable of registration, can be caveated.

In the case of *In re-Registration of a Caveat* [1908] Innes (p. 114) it was held that where a proprietor of land who had taken a loan from a money lender gave a oral promise to charge the land by way of security, the promisee could lodge a caveat to protect what was described as "a caveatable interest" which he had acquired in the land by reason of his promise. In the present case, if I may repeat, the second defendant had no interest whatsoever that could be called caveatable interest on 11 June 1985. The judgment in default which he obtained on 25 June 1985 was a judgment on a claim for goods sold and delivered and it speaks nothing of interest in land. So it is my considered opinion that the second defendant was not entitled under s. 323(1) of the National Land Code to lodge the caveat.

Tun Suffian, the Lord President as he then was in the case of *United Malayan Banking Corporation Ltd v. Goh Tuan Laye & Ors.* [1976] 1 MLJ at p. 170 said:

> ... possession of the title gives them an equitable interest in the land, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor.

At the time when the second defendant lodged his caveat, he had no valid claim over the land whether in the nature of legal or equitable interest. On the other hand the person with whom a issue document to title is deposited like the plaintiff in this case, immediately upon such deposit he acquires an equitable interest. It is not affected by the absence of a caveat. Raja Azlan Shah J, as he then was in the case of *Mercantile Bank Ltd. v. Official Assignee of the property of How Han Teh* at p. 197 said:

> The registration of a caveat does not confer priority nor does it create new right.

At the worst I would say that a depositee of an issue document of title like the plaintiff must have a better claim on the land than a person without that document in his land.

Assuming that I am right in my understanding of s. 323(1)(a) of the National Land Code in particular with respect to the phrase "any right to such title or interest" and that the second defendant was not entitled to lodge the caveat on 11 June 1985 then the plaintiff's charge in equity remains good and unaffected by the action of the second defendant. It follows therefore that any prohibitory order issued at the instance of the second defendant was of no effect because a prohibitory order upon entry has a similar effect to that of a private caveat and neither can it affect a prior claim (see *Tenure and Land Dealings in the Malay States* by David Wong p. 469 and *Karuppiah Chettiar's* case where it was decided that the prohibitory order did not affect the equitable interest prevailing first in time).

On the other hand plaintiff's caveat on 4 March 1987 was properly lodged and registered to protect his interest. The question of delay in this connection is therefore not relevant. The result would be the same if reliance is placed on my second observation that at the worst the plaintiffs must have a better claim on the land as he had the issue document of title all the time in his possession.

Assuming for a moment that the second defendant had some form of equitable interest on the land which I cannot accept, the question is, would the second defendant have priority of equity as against the plaintiff? If I may cite the words of Justice Terrell, Acting Chief Justice as he then was, in the case of *Vallipuram Sivaguru* (at p. 58):

> This brings me, therefore to the only issue which was stressed by Mr. Jeff in the Court of Appeal where he argued that by failure to register the caveat earlier the first defendant had been negligent and lost his priority... shortly the proposition is this - Nagappa Eliathamby himself could not obtain specific performance against Gan Inn because the remedy would be purely equitable and no Court of equity would compel Gan Inn to transfer absolutely to Nagappa Eliathamby property in which he had already given an interest to the first defendant for valuable consideration... The cases such as *Abigail v. Lapin* 1934 AC 491, 505, and *Rimmer v. Webster* 1902, 2CH, 163 are cases in which the holder of an equity has parted with the indicia of title thereby enabling a fraud to be perpetrated upon innocent third parties. In such cases the holder of the equity has been held to lose his priority because his negligence had made the fraud possible.

In the present case, just as in *Vallipuram's* case the issue document of title had been given to the plaintiff for valuable consideration that is a loan and that all the time the issue document of title was in the possession of the plaintiff. The question is whether in the present case the plaintiff has lost his priority of equity through his negligence. It was alleged that because the plaintiff had been negligent on the ground that there was delay because the relevant documents including issue document of title had been kept in a drawer of Miss Catherine Thong all along and only discovered after she had left the plaintiff Counsel's firm was no excuse and that caveat could not have been lodged. The reason given was that the plaintiff's Counsel did not realise that the said documents had been returned by the land

office and that they were all the time in the drawer of the clerk, Miss Catherine Thong, who had then left the firm (see affidavit of Counsel encl. 17 para. 7 to 9) to my mind, it is reasonable enough. The important thing is that the issue document of title has not parted from their possession. In a separate action which has nothing to do with the said land or any land and neither with the plaintiff, but for goods sold and delivered, the second defendant sued the first defendant and obtained judgment in default. Can the plaintiff be said to be at fault in the way of handling the issue document of title? Can the second defendant effect a transfer of the land? To both questions the answer should be "no". In the *Mercantile Bank* case, all the transactions are related to one another and this emanated from one transaction i.e. the granting of the loan to Goh Tuan Laye and the document of title of the land were deposited with the Mercantile Bank as security for the loan. As he could not repay the loan a bankruptcy notice was issued and served on him. He failed to pay the monies and therefore he had committed an act of bankruptcy. Here the official assignee's title in land was an interest in equity. But the absence of a caveat did not affect the equitable interest of the bank which was first in time. In the present case before me the second transaction was really a separate action unrelated to the first and had no reference to any interest in land. In the present case also there were no competing equities, if it is accepted that the second defendant had no equitable interest in the land, and that his caveat of 11 June 1985 was of no effect therefore.

Similarly in the case of *United Malayan Banking Corporation v. Goh Tuan Laye* the two transactions had direct concern with the said land. Overdraft facilities were granted and to secure those facilities documents of title were deposited with the bank (plaintiff/appellant).

The second transaction involved the sale of the said lands to the interveners effected by executing a sales agreement which took place after the deposit of the title. In both transactions, no caveat could possibly be registered in view of a prohibition under the Kelantan Land Settlement Ordinance 1955. In this case it was simply a question of whose equity was first in time. It was of course that of the bank (plaintiff/appellant). There was no question of the plaintiff/appellant being guilty of any act of omission "which had or might have the effect of inducing the respondents to act to their prejudice." In this case the interest in the two transactions were both in the nature of caveatable interest except that the caveats were prevented by law to be registered.

In *Sockalingam Mudaliar's* case, after the defendant's two registered charges were paid off and the discharges were registered, what was in effect left then was the unregistered charge of the plaintiff who lodged and duly registered a caveat to protect it. Then came the attachment over the same land at the instance of the first defendant. So after the withdrawal of the caveat by the two women, the only transaction subsisting were the plaintiff's equitable interest i.e. the unregistered charge and the first defendant's attachment. Of course the Court must protect the plaintiff's equitable interest. Here the question of priority was quite clear while the question of caveatable interest was not in issue. So also in the *Karuppiah Chettiar's* case, the question of the equity did not arise as the judgment debtor i.e. the owner of the land after having sold his land to Subramaniam the judgment debtor had no more interest left to sell.

Again in the *Zeno Limited* case, it is quite clear that the plaintiffs being the depositees of the title deeds in respect of the lands concerned, though the charge was never registered had an equitable interest in the lands and therefore caveatable. A caveat was lodged however by the plaintiff. Subsequently the second defendant obtained a prohibitory order against the said land following a judgment for RM20,514.87 given in his favour in a separate suit against the first defendants. If I may note here that it is not known as to the nature of the claim for

which the said judgment was given in favour of the second defendant. Even assuming that the second defendant had an equitable interest and therefore caveatable as a result of the said judgment, the plaintiff's equitable interest being first in time would in any case prevail. All the more so there was a caveat lodged by the plaintiffs while none by the second defendant. As I mentioned a moment ago that it was not known as to the nature of the second defendant's interest whether caveatable or not, the prohibitory order which the second defendant obtained in any event would not be able to assist or rescue him in establishing his interest over that of the plaintiffs. In the circumstances of the present case the plaintiff's equitable charge dated 1 April 1985 and, of course, his caveat dated 4 March 1987 must prevail and accordingly the writ of seizure and sale issued in Kuantan High Court Civil Suit No. 180 of 1985 including the auction sale held on 6 March 1987 must be set aside.

One further point that perhaps I need mention is in regard to the question of the regularity or otherwise of the auction sale held on 6 March 1987. Procedurally it was argued before me that the sale ought not be set aside in view of the proviso to r. 7(e) of O. 47 of the Rules of High Court 1980. This argument was taken up on the premise as I understood it that the second defendant had an equitable interest in the land or a better equity, which I found he had none. Nevertheless assuming that he had, I find that the argument must also fail in view of the facts of this case. The first writ of seizure and sale issued on 7 November 1985 expired on 7 November 1986. No application for extension of time was ever made "before the day next following that on which the writ would otherwise expire". Instead a fresh writ was applied for on 24 February 1987, some four months afterwards. A prohibitory order (the third one) was registered on 5 March 1987. The auction was carried out the next day. This in effect contravened r. 7(a) of O. 47 of the Rules of High Court 1980 which requires:

> There shall be no sale until the expiration of 14 days from the registration of the prohibitory order under r. 6(3) of the order.

I must say that the proviso to r. 7(e) does not apply to cure the so called irregularity. The irregularity or fraud for that matter must relate to the conduct and proceedings of the sale itself and not to the time when the sale must take place. Neither can this irregularity be cured by O. 2 r. 1 because the said r. 7(a) has its purpose. For example a judgment debtor is still given the right to apply for the postponement of the sale after the registration of the prohibitory order as provided under r. 7(c). The 14 days rule must therefore be strictly complied with. For failure to do so, the sale must be set aside. Looking at it in another way now that the third and fourth defendants have purchased the land and it is said that they have acquired an equitable interest in the land, the question of competing equities did not arise because the plaintiff's equity was first in time and so was his caveat. I must also note here that it was a public auction and parties would have notice of the plaintiff's interest. No amount of allegation of lack of notice of the plaintiff's interest can ever be accepted in the circumstances just because the sale was carried out the day following the registration of the third prohibitory order while the 14 day grace was being conveniently ignored. This is clearly a case of a wanton failure to comply with the 14 day rule.

I therefore granted the reliefs as prayed for.

Also found at [1989] 1 CLJ 530